NO. 13524

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*

v.

MURIEL FIRTH, Administratrix of the Estate of MARTIN W. FIRTH, *Deceased*

On Appeal from the United States District Court for the Northern District of California, Southern Division

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BRIEF FOR THE UNITED STATES

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JURISDICTION

Jurisdiction of the District Court rests upon the Suits in Admiralty and Public Vessels Acts (46 U.S.C. 771-779, 781-790) by reason of a libel filed May 26, 1949, to recover for alleged wrongful death on November 24, 1947.

This Court's jurisdiction rests upon 28 U.S.C. 1291 by reason of a notice of appeal filed June 5, 1952, from a final judgment entered March 10, 1952.

QUESTION

The decedent was a civilian employed by the United States as a workaway in the capacity of an ordinary seaman on an Army transport. He lost his life in the service of the vessel leaving a dependent widow and infant daughter. The widow collected his wages as a government employee and applied for and obtained an award of cash compensation and burial allowance under the Federal Employees' Compensation Act on the ground that he met his death while employed by the United States. Thereafter she brought the present libel for wrongful death, alleging that he was employed as a member of the crew, and returned the Treasury checks issued to her pursuant to the compensation award. A single issue is presented:

Whether a workaway employed by the United States as a member of the civilian crew of a military transport is a civilian employee of the United States, the exclusive recovery for whose death in the service of his ship is under the Federal Employees' Compensation Act.

STATUTES

The pertinent provisions of the Federal Employees' Compensation Act of 1916, as amended, and of the Federal Employees' Compensation Act Amendments of October 14, 1949, c. 691, 63 Stat. 854, are set forth in the Appendix A, infra, pp. 27-29.

STATEMENT

This is an appeal by the United States from a $15,000 judgment (R. 24) in favor of libelant, the widow of a civilian workaway employed by the United

States in the capacity of an ordinary seaman who was killed in the service of his ship, the United States Army Transport CLARKSDALE VICTORY, a public vessel in the military service. The court below rejected (R. 31) the Government's defense (R. 9) that compensation was exclusive and its motion to vacate the judgment and dismiss the libel for failure to state a cause of action because of the exclusive character of the libelant's rights as a beneficiary of the Federal Employees' Compensation Act (R. 27). The court held the United States liable because it concluded that the death of the decedent was caused by the unseaworthiness of the Army Transport and its negligent navigation by those in charge of it (Concl. II, R. 22).

For the purpose of this appeal, the Government does not contest the finding of unseaworthiness and negligence. The errors relied upon by the Government arise exclusively from the holding of the court below (R. 31) that civilian workaways employed by the United States in the capacity of ordinary seamen on military transports are not civilian employees of the United States, the exclusive remedy for whose death in the service of their ship is under the Federal Employees' Compensation Act.

The facts of decedent's employment which give rise to the problem are not disputed. Throughout this lawsuit libelant's decedent was recognized by the pleadings and proof of both parties to be a civilian workaway employed by the United States at wages of one dollar per day plus quarters and subsistence and assigned to duty in the capacity of an ordinary seaman, the regular wages for which position were at the

rate of $150 per month and not at the rate of $30 at which decedent was hired. The libel alleged that the vessel was operated by the United States and "that said Martin W. Firth, deceased, at all times herein mentioned was employed on and aboard said vessel as a seaman" (R. 4). Although this allegation was admitted by the Government's answer (Art. IV, R. 7), and further proof was unnecessary, libelant offered as evidence of decedent's employment by the Government as a crew member aboard the Army Transport CLARKSDALE VICTORY, the certificate of settlement issued in favor of libelant for decedent's final pay account (Exhibit 43, R. 47-49, Appendix B, *infra,* p. 30). This settlement certificate contains the express administrative finding of fact that the wages were "due Martin W. Firth, as an employee of the War Dept.—(now Department of the Army), Transportation Corps, USAT "CLARKSDALE VICTORY." The court below found accordingly that libelant's decedent "was a civilian in the employ of respondent (United States) as a seaman, to wit, a work-away" (Fdg. I, R. 17-18).

This finding, based on the wage settlement and the allegations and admissions of the pleadings, which establish beyond doubt that decedent was a civilian seaman employed aboard the "CLARKSDALE VICTORY" by the Army Transportation Corps, Water Division, is further confirmed by the various documents in libelant's claim file furnished by the Bureau of Employees' Compensation and received in evidence by this court (R. 75). These compensation documents further show not only that libelant applied for and was awarded

compensation under the Federal Employees' Compensation Act on account of the death of her husband in the performance of his duty as a civilian employee of the United States, but further show that the Army paid $491.15 for his funeral expenses as such a civil service employee killed in the performance of duty (Photostat 43) and later paid a further interment allowance of $75 (Photostat 25), and that so far as appears these sums were never returned to the United States.

A claim for Federal Employees' Compensation for libelant and for her infant daughter was submitted by libelant on Compensation Form CA-5 (Photostats 83-86). An accompanying letter, dated October 22, 1948 (Photostat 35, Appendix C, *infra,* p. 32), from libelant's attorneys, Messrs. Crippen & Flynn, who appeared for her both before the Compensation Bureau and in this litigation, advised that their client was filing this suit against the United States under the Jones Act and was also claiming $5,000 War Risk Insurance from the Army, but that libelant did not wish to "accept" compensation benefits at that time. The attorneys' letter also forwarded Form CA-42 (Photostats 19-20) claiming additional burial allowance and stated that the undertaker would handle any further correspondence on that matter. The Bureau replied to the attorneys under date of November 30, 1948 (Photostats 33-34) that the claim which they submitted was in order and libelant was entitled to payment of compensation, but that, if she had elected to receive the War Risk Insurance from the Army, the terms of the war risk policy and regulations required

that compensation payments had to be withheld until the amount of such withhholding equalled the amount paid as War Risk Insurance.

After several further exchanges of correspondence between libelant's attorneys and the Bureau of Employees' Compensation (Photostats 28-29), the Bureau appears to have concluded that although libelant was declining compensation for herself and might elect to receive War Risk Insurance, the infant daughter's right to receive compensation was not impaired. Accordingly, under date of July 13, 1949, the Bureau wrote to libelant advising her that an award of compensation had been made to the child alone, but not to libelant, and that checks for the amount due the child under the award were being mailed (Photostat 9, Appendix D, *infra,* p. 34). The Treasury checks for the cash compensation payments due the infant daughter were returned by libelant's attorneys, as was the check for burial allowance awarded pursuant to the claim on Form CA-42 (Photostats 13, 8, 4).

It is thus undisputable that libelant has not been "paid" (i.e., has not retained), either for herself or for her daughter, any amount under the compensation award or under the War Risk Insurance (Fdg. VIII, R. 21-22). But the evidence is equally clear and undisputable that every Government agency called upon to determine the facts held libelant's decedent to be a civil service seaman employed by the United States and entitled to wages and every other right of such a civilian employee.[1] The court below, in line with the

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[1] The compensation now accrued under the award is stated in a letter from the Compensation Bureau, Appendix E, *infra,* p. 36.

undisputed evidence, found as a fact that: "Martin W. Firth, deceased, was a civilian in the employ of respondent as a seaman, to wit, a workaway, and was upon and aboard the United States Army Transport (U.S.A.T.) CLARKSDALE VICTORY, a vessel owned and operated by respondent when said vessel ran aground, stranded and broke up" (Fdg. I, R. 17-18).

Nonetheless, the court below expressly held decedent was a passenger and not a civilian employee in the order denying the Government's motion to vacate the judgment and dismiss the libel. The order states (R. 31):

> The court observes that two of the libelants in the instant case were not civil service employees on a Government vessel, but were workaways utilizing the CLARKSDALE VICTORY as a means of transportation from Alaska to the United States. The Supreme Court ruling [in *Johansen* v. *United States,* 343 U. S. 427, rehearing denied 344 U. S. 848], as we view it, does not hold that such workaways are covered exclusively by the Federal Employees' Compensation Act.

Because of the serious repercussions of the holding of the court below, it was necessary for the United States to appeal this decision in order to settle the status of civilian workaways employed by the United States on vessels of the Military Sea Transportation Service, the present successor of the Army Transport Service. The present case was selected for appeal and the other cases amicably adjusted, because a single case is believed to be sufficient to decide the question

and the record in the present *Firth* case most clearly shows the facts regarding the status of the decedent as a civil service seaman employed by the United States.[2]

SUMMARY OF ARGUMENT

I. As a workaway libelant's decedent was not a passenger but an employee of the United States as operator of the public vessel involved, and as such was a civilian crew member. Textbooks and decided cases are alike unanimous that a workaway is a seaman of the vessel on which he is employed and has all the rights and duties of any seaman and crew member.

The court below nowhere explains its reasons for departing from the established law. The court apparently thought decedent's wages of $30 a month, plus quarters and subsistence, were so nominal as to make him a "paid" instead of a "paying" passenger. But for compensation benefits, decedent's pay was taken at the established rate for the position in which he was serving and, in any event, his wage of $30 per month far exceeds the rates of twenty-five and thirty cents per month which were paid workaways in previous cases holding them to be seamen and not passengers.

Finally, libelant alleged and respondent admitted, that decedent was a seaman and member of the crew of the public vessel involved, and, after the court below had so found, it would seem that the law and facts of

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[2] This is so because only in the *Firth* case did the libelant both file claim and obtain an award of compensation and also bring suit under the Jones Act, so that a full record is available to this Court on both aspects of the question.

the case were established in that sense unless the court below were to reopen the case and refind the facts.

II. Libelant's decedent was a civilian employee of the United States, the exclusive right for whose service-incident death was under the Federal Employees' Compensation Act. Every civilian employed by the United States, unless expressly excluded by some special statute, is within the coverage of the Act. *Johansen* v. *United States,* 343 U.S. 427, rehearing denied, 344 U.S. 848. The applicable civil service regulations expressly provided with respect to the Army Transport Service that all employees on transport ships are employees in the unclassified civil service exempt from examination; the sole exception being the officers and certain others, who are in the classified and competitive civil service.

The Supreme Court settled in *Johansen, supra,* that the Compensation Act "is the exclusive remedy for civilian seamen on public vessels" (at. p. 441). Indeed, it expressly declared that whenever the Government has created any "comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect" (*id.* 441). The court below applied this rule to Veterans' Compensation in *Pettis* v. *United States,* (N.D. Calif., 1952) 108 F. Supp. 500. It is not believed that the court meant to depart from that rule in this case, but would have dismissed the libel except for its doubts as to the status of workaways as seamen. This Court should accordingly order the dismissal now.

III. Dismissal of the libel on the ground that compensation is exclusive was contemplated by Congress and will allow libelant a larger ultimate recovery than her $15,000 judgment. Libelant's compensation rights are worth $37,283.17, or over twice as much as her judgment. They are worth over three times as much, after deduction of the standard twenty percent attorneys' fee of 28 U.S.C. 2678, as a result of which libelant would obtain $12,000 and her attorneys $3,000 from the judgment.

Congress in section 303(g) of the Compensation Act Amendments of 1949 (5 U.S.C. (Supp. V) 757 note) contemplated that compensation would eventually be held by the Supreme Court to be exclusive and has expressly provided that claimants, like libelant here, shall have one year from the dismissal of their lawsuits within which to claim their compensation rights. There is therefore every reason why this Court should apply the *Johansen* rule and order the libel dismissed for failure to state a cause of action.

ARGUMENT

I.

As a Workaway Libelant's Decedent Was Not a Passenger But Was a Seaman and Member of the Crew Employed by the United as the Operator of the Vessel Involved.

The court below was clearly in error when it held, as a matter of law and contrary to its own finding of the facts, that decedent was not an employee of the United States as operator of the ship but as a workaway was merely a passenger (Cf. R. 31). The general understanding that a workaway is a seaman employed as a member of the crew and not a passenger

utilizing the vessel as a means of transportation is exemplified by the definition in De Kerchove, *International Maritime Dictionary* (1948):

> WORKAWAY. Slang term to denote a person who works his passage on a ship, as distinguished from a stowaway. The workaway is a seaman and a member of the crew. He signs articles.

It is similarly stated in 2 Norris, *Law of Seamen* (1952) § 654, p. 316:

> A workaway is a stranded or repatriated individual, who signs the articles and agrees to perform some services in exchange for his transportation—invariably for wages at a nominal amount. By signing the articles and becoming a member of the ship's company and being engaged on a vessel in navigation and doing work of a maritime nature he is a seaman, and when injured by reason of his employer's negligence he has a Jones Act remedy. [Citing *The Tashmoo* (E.D.N.Y., 1930) 48 F. 2d 366; *Buckley* v. *Oceanic S.S. Co.* (9th Cir., 1925) 5 F. 2d 545.]

The contrary holding of the court below that workaways are not seamen employed as members of the crew, but instead are mere passengers, so that libelant's decedent was only "utilizing the CLARKSDALE VICTORY as a means of transportation" (R. 31, *supra,* p. 7) stands alone against every other know decision.

Dozens of unreported cases, both against private operators and against the Government in WSA/NSA operations have treated workaways as seamen and

members of the crew for the purposes of suits for Jones Act negligence, for seaworthiness, and for maintenance, cure and wages, without the question of their seaman's status ever being doubted. See e.g. this Court's decision in *Buckley* v. *Oceanic S.S. Co., supra.* Indeed, the only cases finding it necessary to discuss so obvious a question as the status of a seaman employed as a workaway dealt with questions of salvage and imprisonment. In *The Tashmoo, supra,* (48 F. 2d at 368) the court observed, "The advocates for libelant contend that, because of the small [thirty cents per month] salary paid and the condition of libelant's employment, he may be considered for the purpose of a salvage award as a passenger, but such contention cannot be sustained; on the contrary he was a seaman." Again, in *Dick* v. *United States Lines Co.* (S.D. N.Y., 1941) 38 F. Supp. 685, the court held that, as a workaway, plaintiff "was in the employ of the vessel's owners as a member of the crew" and that "as such, he was subject to proper discipline."

In the present case, the reasons of the court below for the contrary holding, that a workaway is not employed as a seaman but is a passenger merely utilizing the vessel as a means of transportation, are nowhere explained by the court. It may be because decedent, although assigned to duty as an ordinary seaman, the pay for which was then at the base rate of $150 a month or $1,800 per year, was employed as a workaway at the nominal wage of $1.00 per day or $30 per month, that the court thought he should be regarded as something new—a "paid" instead of a "paying" passenger. But this same argument had

been presented and rejected in the *Buckley* and *Tashmoo* cases. Yet decedent's wages as a workaway in this case, while only $30 per month, as compared with $150 full ordinary seaman's wages, were proportionately many times greater than the token wages of twenty-five cents per month paid in *Buckley* and thirty cents per months paid in *The Tashmoo* at a time when ordinary seamen were paid about $30. Moreover, in computing the death compensation payable to libelant, the full ordinary seaman's rate of $1,800, plus subsistence valued at $192 and quarters at $60 applied and was employed.

In summary, we believe that the decision below, the rationale of which would deprive workaways employed on private merchant vessels of the protection of the Jones Act and of the seamen's traditional right to maintenance and cure and would limit them to the inferior rights of passengers, is so undesirable a departure from the established law, the privileged treatment of which seamen enjoy as wards of the admiralty judges, that it must be rejected by this court. Indeed, so far as libelant's counsel are concerned, there seems to be no doubt that they have heretofore shared the established view that workaways are seamen employed by the ship operator and entitled to the superior status of that privileged rating. It is plain that in drawing the libel decedent was regarded by counsel as entitled to be classed as a seaman employed by the United States. Not only did Article IV of the libel so allege (R. 4), but Article II (R. 3) claimed the seaman's right to proceed without prepayment of costs—a right not avail-

able to a mere passenger utilizing the vessel as a means of transportation. We therefore submit that there is no foundation for the contrary holding of the court below and it should be reversed.

II.

Libelant's Decedent Was a Civilian Employee of the United States, the Exclusive Right for Whose Death in the Service of His Ship Was Under the Federal Employees' Compensation Act.

The court below clearly was in error if it meant to hold that libelant's decedent, because he was a workaway employed by the United States on a military transport, was not within the coverage of the Federal Employees' Compensation Act and the rule of *Johansen* v. *United States,* 343 U.S. 427, rehearing denied 344 U.S. 848. Unless excluded by special statute, every employee on a vessel publicly operated by the United States comes within the coverage of the Compensation Act. Even merchant marine cadets on school ships come within the coverage of the Act and their compensation rights are exclusive of any cause of action against the United States under martime law. *Sbarbaro* v. *United States,* (E.D. Pa.) 1952 A.M.C. , F. Supp. . Workaways employed by the United States as members of the crew of a publicly operated vessel are an *a fortiori* case.[3]

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[3] The court below appears to have been confused, as it was in *Gibbs* v. *United States,* 94 F. Supp. 586, concerning the status of seamen on public vessels *operated by* the United States as opposed to those on merchant vessels *operated for* the United States. All public vessel seamen employed by the United States are entitled to compensation as their exclusive right even when the public vessel involved is "employed as merchant vessel" *by* the United

The Federal Employees' Compensation Act applies to every employee of the United States who is in the civilian or so-called "civil service", as distinct from the "military service," unless he is expressly excluded therefrom. The Compensation Act provides (Sec. 1, 5 U.S.C. 751) "That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty." There is no possible exception which could apply to exclude a workaway on an Army Transport such as decedent here. The Civil Service Rules, which were in effect in 1947, expressly provided, with respect to the Army Transport Service, that "all employees on transport ships, with the exception of the officers and

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States, so as to bring it not only within the Public Vessels Act but within the Suits in Admiralty Act (Sec. 2; 46 U.S.C. 742; see H. Rep. No. 669, 66th Cong. 2d Sess., p. 5; reprinted 59 Cong. Rec. 3631). Merchant vessel seamen employed by private operators are not entitled to compensation and have their exclusive right by suit for injury even when the merchant vessel involved is privately operated *for* the United States so as to permit them to bring such suit not only against their private employers but also against the United States under the Suits in Admiralty Act (Sec. 2; 46 U.S.C. 742). Thus, in none of the cases cited in *Gibbs* (94 F. Supp. at 589, fn. 9) as having been allowed to proceed against the United States "without any discussion of the FECA" were the seamen covered by the FECA (See 34 Op. A.G. 120 and Comp. Gen. deision A-31684, refusing to accept 34 Op. A.G. 363), although the underwriters for the private operators might have voluntarily offered settlement by payment of "compensation." Compare *In re Panama Transport Co.* (S.D. N.Y., 1951) 98 F. Supp. 114, 117 and *Bay State Dredging Co.* v. *Porter* (1st Cir., 1946) 153 F. 2d 827, with *Stewart* v. *United States,* (E.D. La., 1928) 25 F. 2d 869. The court below seems to have thought that consistency required the Government to deny such seamen a right to sue as well as any right to compensation.

certain others, are employees in the unclassified civil service exempt from examination."[4]

Nowhere is there any indication that a distinction could be drawn amongst various types of civilian crew members on military transport vessels nor that civilian seamen employed by the Army as workaways could be differently treated from those employed at the full wages of the position to which they were assigned. This is illustrated by the fact that in the present case the compensation payable on account of the death of decedent as a workaway depends upon the full pay of his position of ordinary seaman in which he was serving at the time of his death and not upon the nominal wages paid him because he was employed as a workaway on the particular voyage.

Certainly nothing in the *Johansen* case indicates an intention on the part of the Supreme Court that dependants of employees on military transports were to enjoy an election either to accept compensation or to bring suit for damages merely because as workaways their wages for the particular voyage were at the rate of $30 instead of $150 per month. The Supreme Court specifically rejected the contention that Congress intended that there should be any right of election in any case. It held that compensation when available is exclusive and declared "There is no reason to have two systems of redress" (343 U.S. at 439), "Had Congress intended to give a crew member on a public vessel a right of recovery for damages, * * * we think that

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[4] Civil Service Rules, Schedule A, 5 Code of Fed. Regs. Secs. 2.1, 2.3, 50.0, 50.4 (b) pp. 9, 48, 51. Officers were in the classified civil service.

this advantage would have been specifically provided'' (*ib.* at 440).

The Supreme Court has thus held that specific legislation is necessary to take any particular case out of the normal rule that compensation of every type is exclusive wherever it is available. The Court emphatically rejected the argument that an express declaration of exclusiveness, such as was added for the first time in 1949, is necessary. It said (343 U.S. at 433, 439-440, 441):

> It is quite understandable that Congress did not specifically declare that the Compensation Act was exclusive of all other remedies. At the time of its enactment, it was the sole statutory avenue to recover from the Government for tortious injuries received in Government employment. Actually it was the only, and therefore the exclusive remedy. See *Johnson* v. *United States,* 186 F. 2d 120, 123.[5]
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> The Federal Employees Compensation Act, 5 U.S.C. §§ 751 *et seq.,* was enacted to provide for injuries to Government employees in the per-

[5] Accord, *Posey* v. *Tennessee Valley Authority,* (5th Cir., 1937) 93 F. 2d 726, 728: ''This compensation is the sole remedy ordinarily available to an injured employee of the United States because of the general refusal to permit suits for torts. It is not a gratuity or grace, but a measured justice operating on the same general basis as state compensation laws. We entertain no doubt that Congress can limit the remedy of injured employees of its instrumentality to this compensation. We have but little doubt that it is so intended.'' Thus, despite the fact that the same court

formance of their duties. It covers all employees. Enacted in 1916, it gave the first and exclusive right to Government Employees for compensation, in any form, from the United States. It was a legislative breach in the wall of sovereign immunity to damage claims and it brought to Government employees the benefits of the socially desirable rule that society should share with the injured employee the costs of accidents incurred in the course of employment. Its benefits have been expanded over the years. See 5 U.S.C. (Supp. III) §§ 751 *et seq.* Such a comprehensive plan for waiver of sovereign immunity, in the absence of specific exceptions, would naturally be regarded as exclusive. See *United States* v. *Shaw,* 309 U.S. 495.[6]

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This Court accepted the principle of the exclusive character of federal plans for compensation in Feres v. *United States, 340 U.S. 135. Seeking*

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in *Sevin* v. *Inland Waterways Corp.,* (5th Cir., 1937) 88 F. 2d 988, had held, like this court in *United States* v. *Loyola,* (9th Cir., 1947) 161 F. 2d 126, that there was *jurisdiction* for government seamen's suits against the United States, Sevin's libel (E.D. La. Adm. No. 237) was dismissed. Accord, *United States* v. *Meyer,* (5th Cir.) 1952 A.M.C. 2053, 200 F. 2d 110, dismissing the libel "for failure to state a cause of action."

[6] *Feres* v. *United States,* (2d Cir., 1949) 177 F. 2d 535, 537-538, aff'd. 340 U.S. 135, similarly explains the omission of the original thirteenth exception covering compensation claims, by observing that sec. 7 of the F.E.C.A. "provided that as long as an employee is in receipt of compensation under the act 'he shall not receive from the United States any salary, pay, or remuneration whatsoever except for services actually performed, and except pen-

so to apply the Tort Claims Act to soldiers on active duty as "to make a workable, consistent and equitable whole," p. 139, we gave weight to the character of the federal "systems of simple, certain, and uniform compensation for injuries or death of those in armed services." p. 144. Much the same reasoning leads us to our conclusion that the Compensation Act is exclusive.

* * * * *

All in all we are convinced that the Federal Employees Compensation Act is the exclusive remedy for civilian seamen on public vessels. *As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect.*[7]

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sions for service in the Army or Navy of the United States' * * *. Consequently, it would seem that the explanation for the omission of the thirteenth exception to the Tort Claims Act is that it was considered unnecessary." And in *Dahn* v. *Davis,* (1922) 258 U.S. 421, 429-430, the Supreme Court said of sec. 7, "It would be difficult to frame a clearer declaration than this that no payment would be made by the Government for injuries received other than as provided for in the act."

[7] As was said in *Lewis* v. *United States,* (D.C. Cir., 1951) 190 F. 2d 122, 124, 342 U.S. 869, "Congress is the body which must ultimately pass on the question of the amount and sufficiency of the benefits to be received by the Park Police, or by any other group of Federal employees. Congress annually appropriates for their salaries and for the amounts to be contributed by the Federal Government under legislation providing for retirement pay and compensation for injuries. Congress can increase or reduce these amounts. It can grant new gratuities through private bill or general legislation. And 'if we misinterpret the Act, at least Congress possesses a ready remedy.' *Feres* v. *United States, supra,* at p. 138."

It is, therefore, our view that once it is established that workaways are seamen and not passengers, the *Johansen* case is fully dispositive of the case now at bar. It decides that civilian employees of the United States, including those workaways serving as members of the civil service crews on military transports, are covered exclusively by the Federal Employees' Compensation Act. Libelant's rights under the Compensation Act therefore preclude the existence of any cause of action for damages in the libelant and required the dismissal of her libel by the court below.

We do not understand the court below to have disagreed that compensation of any type is exclusive if available, so that if a workaway is in fact—as the court below found libelant's decedent to be in this case (R. 17-18)—an employee of the United States, the libelant's compensation rights would be exclusive. On the contrary, the same district judge who decided the present case has held, applying the rule of the *Feres,* and *Johansen* cases, that the system of veterans' compensation, like any other compensation system, precludes recovery by suit for injuries sustained in the course of medical treatment under the veterans' benefit statutes. *Pettis* v. *United States,* (N.D. Calif., 1952) 108 F. Supp. 500. And the same rationale would seem applicable here for, as the Supreme Court said in *McMahon* v. *United States,* 343 U.S. 25, 27, while seamen enjoy a superior status as wards of the admiralty judges and "legislation for the benefit of seamen is to be construed liberally in their favor, it is equally true that statutes which waive immunity of

the United States from suit are to be construed strictly in favor of the sovereign."

We believe that the court below would have dismissed libelant's suit were it not for its belief that workaways should be held to be passengers and not seamen. We therefore submit that, since they plainly are seamen, this Court should direct the dismissal of the libel.

III.

Dismissal of the Libel on the Ground That Compensation Is Exclusive Was Expressly Contemplated by Congress and Will Give Libelant a Larger Recovery Than the Judgment Below.

For the reasons set forth above, we submit that libelant's claim for the loss of her husband in the service of his ship is not actionable. That does not mean that the United States will not compensate her for the loss of her husband. Her compensation claim will be reopened as provided in section 303(g) of the 1949 Compensation Act amendments (5 U.S.C. (Supp. V) 757 note) and her benefits thereunder will be worth $37,283.17, or over twice as much as her $15,000 judgment below.

A detailed statement of the amounts due the libelant at the time of the $15,000 award below is contained in a letter from the Chief Claim Examiner, Bureau of Employees Compensation (Appendix E, *infra,* pp. 36). It shows that as of November 1, 1951, just before the court below filed its opinion of November 14, 1951, fixing libelant's recovery at $15,000, libelant could immediately have collected accrued compensation of $4,042.44, consisting of $1,012.32 for her minor daughter and $3,030.12 for herself. Thereafter, until

the minor daughter became eighteen on November 18, 1964, libelant would receive a further $14,671.80, consisting of 156 monthly installments of $25.65 for the daughter and $68.40 for herself.[8]

These amounts, which added to the $4,042.44 already accrued total $18,714.24, would of themselves substantially exceed the $15,000 judgment. But after the minor daughter's arriving at age 18, libelant's compensation benefits will increase and will continue thereafter at the higher rate of $76.95 per month. The commuted value of those higher installments for libelant's life expectancy at that time is $18,568.93.[9] This amount, added to the previous total of $18,714.24, shows that

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[8] If libelant elected immediate payment for herself of the $5,000 war risk benefit, her own installments would not, of course, accrue until about April 1, 1954, but the $1,012.32, for account of the minor daughter, would still be payable immediately. See Compensation Bureau's letter, Appendix E, *infra,* p. .

[9] When the minor daughter, born November 18, 1946, becomes age 18 in 1964, the widow, born December 24, 1925, will be age 39. The value of her annuity of $923.40 (or $76.95 a month), multiplied by the value of an annuity of $1.00 at three percent for a white female age 39, or $20.1093, is $18,568.93. U. S. Bureau of the Census, *U. S. life tables and actuarial tables, 1939-1941* (G.P.O., 1946) p. 77. These actuarial functions tabulated by the Census are slightly higher than those of the Commissioner's 1941 Standard Ordinary Mortality Table, recognized by law in California, Oregon and many other states; the Commissioner's tables in turn are much more favorable than are commercial rates because they also are based on interest and mortality only and do not include any allowance for factors, such as operating expenses, which go to determine the rates actually charged by insurance companies (*ibid.,* p. 55-57). If libelant sought to invest the $12,000 net proceeds of her judgment, these factors would materially reduce the annuity she could purchase and further increase the desirability of compensation.

the full value of libelant's compensation claim is $37,283.17, or over twice the amount of her $15,000 judgment. Indeed, libelant's compensation benefits are actually over three times the *net amount* she would obtain from the $15,000 judgment below, because we must presume that the $15,000 would be subject to deduction of the standard attorneys' fee of twenty percent (cf. 28 U.S.C. 2678), thus giving libelant's attorneys a $3,000 fee and herself a net realization of $12,000.

There is no doubt that libelant can receive compensation if this Court orders her libel dismissed. In enacting the Federal Employees' Compensation Act Amendments of October 14, 1949, c. 691, 63 Stat. 854, Congress expressly contemplated the existence of lawsuits brought by compensation beneficiaries such as libelant. On the one hand, it provided that where such suits are compromised or judgments satisfied no compensation may be paid (Sec. 302; 5 U.S.C. (Supp. V) 791-3). On the other, Congress provided that where such litigation is proceeded with and dismissed because compensation is exclusive, the claimants shall have one year from the dismissal within which to claim their compensation rights (Sec. 303(g); 5 U.S.C. (Supp. V) 757 note).

Congress contemplated that when the Supreme Court finally resolved the conflicting lower court decisions regarding exclusiveness, it was highly probable that it would hold that the original Compensation Act of 1916 had always been exclusive as regards government civil service seamen. Congress therefore,

expressly provided in section 303(g) of the Federal Employees' Compensation Act Amendments of October 14, 1949, c. 691, 63 Stat. 854, 5 U.S.C. (Supp. V) 757 note, that, if the 1916 Compensation Act should be held to be exclusive, "any person who has commenced a civil action or an action in admiralty with respect to such injury or death" may—

> * * * If any such action is not discontinued and is decided adversely to the claimant on the ground that the remedy or liability under the Federal Employees' Compensation Act is exclusive, or on jurisdictional grounds, or for insufficiency of the pleadings, the claimant shall within the time limited by sections 15 to 20 of such Act (including any extension of such time limitations by any provision of this Act), or within one year after final determination of such cause, whichever is later, be entitled to file a claim under such Act.

This provision was one of the amendments proposed by Senator Morse with a view to protecting the interest of civil service seamen and their beneficiaries, since the eventuality that the 1916 Act would be held by the Supreme Court to be exclusive in the case of seamen was not unexpected. Thus, speaking of the above-quoted provision of Section 303(g), designed, as Senator Morse put it, "to permit seamen to pursue

their remedies (if they have any) sought in pending cases or to come under the terms of the Compensation Act," he said (95 Cong. Rec. 13609)—

> * * * Moreover, in recognition of the fact that some legal actions might be decided adversely to the claimant on grounds other than the merits of the claim, *it is provided that persons whose pending claims are dismissed* on jurisdictional grounds, insufficiency of the pleadings, or *because the remedy under the Compensation Act is exclusive,* may file claim under the Compensation Act within similar time limitations. [Emphasis supplied].

And in the same way, in accepting the seamen's amendments of Senator Morse, Senator Douglas, who had charge of the bill on the floor, declared "we are not seeking to legislate affirmatively as to certain claims and denials of a right of election of remedies which claims and denials have not yet been adjudicated" (95 Cong. Rec. 13609).

The Congressional purpose was to preserve the status quo pending decision of the Supreme Court, while at the same time protecting claimants against any loss of rights by continuing their litigation until the Supreme Court should speak. The seamen's protective amendments of Senator Morse therefore fully

protect libelant in this case against the consequences of the dismissal of her action, as required by the Supreme Court's final decision of the question in the *Johansen* case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the district court should be reversed and the case remanded with instructions to dismiss the libel for failure to state a cause of action but without prejudice to libelant's right to renew her claim for compensation in accordance with the proviso of section 303(g) of the Act of October 14, 1949, c. 691, 63 Stat. 866, 5 U.S.C. (Supp. IV) 757 note.

WARREN E. BURGER,
Assistant Attorney General,

CHAUNCEY F. TRAMUTOLO,
United States Attorney,

LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Special Assistants to the Attorney General,
Attorneys for the United States.

February 1953.

APPENDIX A

1. The Federal Employees' Compensation Act of September 7, 1916, c. 458, 39 Stat. 742 (5 U.S.C. 751 *et seq.*), provides in pertinent part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.
>
> * * * * *
>
> Sec. 32. That the commission is authorized to make necessary rules and regulations for the enforcement of this Act, and shall decide all questions arising under this Act.
>
> * * * * *
>
> Sec. 36. The commission, upon consideration of the claim presented by the beneficiary, and the report furnished by the immediate superior and the completion of such investigation as it may deem necessary, shall determine and make a finding of facts thereon and make an award for or against payment of the compensation provided

for in this Act. Compensation when awarded shall be paid from the employees' compensation fund.

2. The pertinent provisions of the Federal Employees Compensation Amendments of October 14, 1949, c. 691, 63 Stat. 854, are as follows:

Sec. 302. The provisions of this Act shall not be construed to authorize the payment of any compensation under the Federal Employees' Compensation Act in any case where, pursuant to private relief legislation, a beneficiary of such legislation has accepted payment of a grant in satisfaction of the liability of the United States (or its corporation, agency, or other instrumentality) in such case, or where such liability has been compromised and settled, or other satisfaction received, as the result of any action sounding in tort or under maritime law, or where a lump sum has been received under section 14 of the Federal Employees' Compensation Act and the lump-sum award is not modified or set aside for other reasons.

Sec. 303 * * *

(g) The amendment made by section 201 of this Act to section 7 of the Federal Employees' Compensation Act, making the remedy and liability under such Act exclusive except as to masters or members of the crew of any vessel, shall apply to any case of injury or death occurring prior to the date of enactment of this Act:

Provided, however, That any person who has commenced a civil action or an action in admiralty with respect to such injury or death prior to such date, shall have the right at his election to continue such action notwithstanding any provision of this Act to the contrary, or to discontinue such action within six months after such date before final judgment and file claim for compensation under the Federal Employees' Compensation Act, as amended, within the time limited by sections 15 to 20 of such Act (including any extension of such time limitations by any provision of this Act), or within one year after enactment of this Act, whichever is later. If any such action is not discontinued and is decided adversely to the claimant on the ground that the remedy or liability under the Federal Employees' Compensation Act is exclusive, or on jurisdictional grounds, or for insufficiency of the pleadings, the claimant shall, within the time limited by sections 15 to 20 of such Act (including any extension of such time limitations by any provision of this Act), or within one year after final determination of such cause, whichever is later, be entitled to file a claim under such Act.

APPENDIX B

106725

ADVICE OF PAYMENT TO ACCOMPANY CHECK

General Accounting Office

Claim No.: *2985247* WASHINGTON, *January 3, 1949*
Muriel Firth, as widow of CERTIFICATE NO.
Martin W. Firth, deceased, *1714337*
81 Prosser Street,
Salishan,
Tacoma, Washington.

I have certified that there is due you from the United States, payable from the appropriation(s) indicated, the sum of—

SEVEN AND NO/100 Dollars (*$7.00*)

on account of

amount due Martin W. Firth, as an employee of the War Department (now Department of the Army), Transportation Corps, USAT "Clarksdale Victory" under the Missing Persons Act of 1942, as amended, 56 Stat. 143. (Army FINKE-(2) 154)

2180425 Finance Service, Army, 1948

(801-970 P 970-13 S99-999)

[Endorsed]
C. B. LENOW COL. FD
WASHINGTON, D. C.
950
SYM. 210-186

The enclosed Treasury check is in settlement of said claim(s).

The Comptroller General of the United States
By B. S. LAWRENCE 470792
26 Jan 1949

CLAIMANT'S NOTICE

APPENDIX C

Samuel L. Crippen
Res. Proctor 8706

Creighton C. Flynn
Res. Garland 7661

Crippen and Flynn
Lawyers

Suite 710 Rust Building
Broadway 6714
Tacoma 2, Wash.

October 22nd, 1948.

Bureau of Employees' Compensation
Federal Security Agency
Federal Security Building
4th Street and Independence Ave., S.W.
Washington 24, D. C.

Reference: X-346150

Gentlemen:

We enclose herewith the following documents: forms CA-5, CA-42; certified photostatic copy of Marriage Certificate, and certified copy of Birth Record. We wish to advise that we represent Muriel Firth, widow of the decedent and are filing an action against the United States for wrongful death under the Jones Act.

Until that action has been determined, we do not wish to accept any benefits under the United States Employees' Compensation Act, and we are filing these documents with you merely to preserve Mrs. Firth's rights in the event that she should later desire to receive benefits.

We wish to advise that waivers have been submitted to Mrs. Firth by the Acting Assistant Adjutant General of the San Francisco Port of Embarkation for her signature in order to qualify for benefits under the Seaman's War Risk Policy, these waivers stating that if an application had been made for United States Employees' Compensation Act benefits, and she desired to receive War Risk benefits in lieu of compensation, that said compensation should be deducted from the insurance and that should constitute a release as to the United States Government and a satisfaction of any claim for United States Employees' Compensation Act benefits. As we pointed out in our letter to the Acting Assistant Adjutant General, we are not aware of the law under which Mrs. Firth is required to waive her rights before qualifying for benefits under the Seaman's War Risk insurance.

The claim for burial expenses will be preferred by Theo. B. Gaffney, mortician, who handled the case.

We would appreciate hearing from you as to whether these documents comply with your requirements.

Sincerely yours,

CRIPPEN & FLYNN and HAROLD A. SEERING

By: Creighton C. Flynn

CCF:DT

cc: Hdq., San Francisco
Port of Embarkation
Fort Mason, Calif.

APPENDIX D

July 13, 1949 X-346150

Mrs. Muriel Firth
81 Prosser Street
Salishan
Tacoma, Washington
Dear Mrs. Firth:

The Bureau has reference to the claim for compensation which you filed on account of the death of Martin W. Firth, a former employee of the Army Transport Service, who died on November 24, 1947.

The claim on behalf of Barbara Louise Firth, minor daughter of the decedent, has been approved for compensation equal to $17.10 per month beginning on November 25, 1947 and continuing until she dies, marries, or reaches the age of eighteen years, or, if over eighteen years and incapable of self-support, becomes capable of self-support.

On July 5, 1949 a check in the amount of $311.22 went forward to you representing compensation for the period from November 25, 1947 to May 31, 1949. Beginning on July 1, 1949 monthly checks for $17.10 each will go forward on the first of each month.

There is enclosed a supply of claim forms CA-13 to be used in claiming further compensation. One of these forms should be completed on or soon after the first of each JANUARY and JULY in accordance with the instructions on the back of the form, and forwarded to this office. If claims are not forwarded on the above dates compensation will be suspended until the Bureau

has ascertained whether you are still entitled to receive the compensation.

If Barbara's status should change and a check reaches you in payment of compensation you should return the check to this office at once, with an explanation.

This letter should be retained by you as evidence of the award and the instructions carefully complied with to insure prompt payments.

Very truly yours,

R. W. GREENE
Chief of Section

WJH:cke

CC-1-The Chief of Transportation, War Department, Washington 25, D. C.
Att: Col. Wilbur S. Elliott, Water Transport Service

2-The Commanding General, San Francisco Port of Embarkation, Building 213, Fort Mason, California

APPENDIX E

U.S. Department of Labor
Bureau of Employees' Compensation
Washington, 25, D. C.

Address only:
Bureau of Employees' Compensation
Washington 25, D. C.

In Reply refer to File No. X-346150

October 24, 1952

Leavenworth Colby, Esq.
Special Assistant to the Attorney General
Admiralty and Shipping Section
Department of Justice
Washington 25, D. C.

Re: USAT Clarksdale Victory — Government Vessel Employee's Death, November 24, 1947
Muriel Firth, Admx. of the Estate of Martin W. Firth, deceased v. United States.
ND California, Adm. No. 25428-E

Dear Mr. Colby:

This will reply to your letter of October 17, 1952, requesting information as to the amount of compensation under the Federal Employees' Compensation Act which had accrued as of November 1, 1951, and the amount thereafter payable, in the case of Mrs. Muriel Firth, widow of Martin W. Firth, on account of the death of her husband, a former employee of the

Army Transportation Corps, Water Division, who died on November 24, 1947, when the USAT CLARKSDALE VICTORY was lost.

For the widow herself, the amount of compensation accrued as of November 1, 1951, totals $3030.12. During the same period the amount accrued to her for Barbara Louise Firth, daughter of the deceased, totals an additional $1012.32.

Compensation for the widow herself will continue payable after November 1, 1951, until her death or remarriage, at the monthly rate of $68.40. Compensation of Barbara will continue payable at the monthly rate of $25.65, until the child dies, marries, or reaches the age of eighteen, or if over eighteen years and incapable of self-support, becomes capable of self-support.

From the date that compensation ceases to be payable for the child, the compensation payable for the widow herself until her death or remarriage will be increased to the monthly rate of $76.95.

The foregoing payments are subject, however, to the provisions of the war risk insurance policy, which state that the benefits paid thereunder must be deducted from any compensation benefits otherwise payable to the beneficiary of the policy. If Mrs. Firth should elect to accept payment of the $5,000 war risk benefit, no compensation benefits can be paid to her for her own account until such time as the total amount payable provided under the Federal Employees' Com-

pensation Act shall total the $5,000 paid under the insurance policy. In the case of Mrs. Firth this would appear to be about April 1, 1954.

Very truly yours,

DANIEL M. GOODACRE
Chief Claim Examiner

DMG:djv:fgl

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